

BEFORE THE
DEPARTMENT OF TRANSPORTATION

WASHINGTON, D. C.

DEPT. OF TRANSPORTATION
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QA-5735

OST-95-792-2

Joint Application of

AMERICAN AIRLINES, INC. and
EXECUTIVE AIRLINES, INC., FLAGSHIP
AIRLINES, INC., SIMMONS AIRLINES,
INC., and WINGS WEST AIRLINES, INC.
(d/b/a AMERICAN EAGLE)

and

CANADIAN AIRLINES INTERNATIONAL LTD.
and ONTARIO EXPRESS LTD. and TIME AIR
INC. (d/b/a CANADIAN REGIONAL) and
INTER-CANADIAN (1991) INC.

under 49 USC 41308 and 41309 for approval
of and antitrust immunity for commercial
alliance agreement

OST-95- 792

JOINT MOTION OF AMERICAN AIRLINES, INC. et al.
AND CANADIAN AIRLINES INTERNATIONAL LTD. et al. FOR
CONFIDENTIAL TREATMENT UNDER 14 CFR 302.39

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November 3, 1995

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D. C.

Joint Application of

AMERICAN AIRLINES, INC. and
EXECUTIVE AIRLINES, INC., FLAGSHIP
AIRLINES, INC., SIMMONS AIRLINES,
INC., and WINGS WEST AIRLINES, INC.
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OST-95-

under 49 USC 41308 and 41309 for approval
of and antitrust immunity for commercial
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JOINT MOTION OF AMERICAN AIRLINES, INC. et al.
AND CANADIAN AIRLINES INTERNATIONAL LTD. et al. FOR
CONFIDENTIAL TREATMENT UNDER 14 CFR 302.39

American Airlines, Inc. and its regional affiliates
and Canadian Airlines International, Ltd. and its regional
affiliates hereby file this motion requesting the Department to
withhold certain proprietary and commercially sensitive confi-
dential information from public disclosure, under 14 CFR 302.39
and 49 USC 40115.

Confidential information is being submitted by the
Joint Applicants in connection with their application for
approval of and antitrust immunity for a commercial alliance
agreement. With respect to these documents, the Joint **Appli-**

cants are requesting that access be limited to counsel and outside experts for interested parties due to the extremely competitively sensitive nature of such documents.

In support of this motion, the Joint Applicants state as follows.

- I. THE CONFIDENTIAL INFORMATION IS PROTECTED FROM PUBLIC DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT.

All of the confidential information in question is protected from public disclosure under various exemptions in the Freedom of Information Act, including 5 USC 552(b)(3) and 5 USC 552(b)(4).

Exemption 4 exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or **confidential**." This exemption has been construed to prevent public disclosure of information that is not the type usually released to the public, and that if released would cause substantial harm to the competitive position of the person from whom the information was obtained. See, e.g., Gulf & Western Industries, Inc. v. United States, '615 F.2d 527, 530 (D.C. Cir. 1980); American Airlines, Inc. v. NMB, 588 F.2d 863, 871 (2d Cir. 1978); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 684 (D.C. Cir. 1976); Joint Application of Delta and Virgin Atlantic, Order 94-5-42, May 28, 1994; Joint Application of United and Lufthansa, Order

93-12-32, December 18, 1993; Joint Application of Northwest and KLM, Order 93-1-11, January 8, 1993, p. 19; Information Directives Concernina CRS, Order 88-5-46, May 22, 1988; Carrier-Owned Computer Reservations Svstems, ER-1385, Order 86-5-54, May 19, 1986; Information Directives Concernina CRS, Order 83-12-136, December 29, 1983. The purpose of these exemptions "is to protect the confidentiality of information which citizens provide to their government, but which would customarily not be released to the public, and to facilitate citizens' ability to confide in their **government.**" Burke Energy Corn. v. DOE, 583 **F.Supp.** 507, 510 (D. Kansas 1984).

For information to qualify for exemption under Exemption (4), the information must be (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential. See Public Citizen Health Research Group v. FDA, 704 **F.2d** 1280, 1290 (D.C. Cir. 1983). All of the confidential information submitted by the Joint Applicants satisfies this three-part test.

First, the confidential information is commercial or financial in nature, in that it relates to commercially sensitive, proprietary, and privileged financial and corporate information. This type of confidential information is proprietary and commercially sensitive, and would not otherwise be made public. It is being submitted to the Department so

that the Department can expeditiously evaluate the public interest benefits that will result from granting approval of and antitrust immunity for the Joint Applicants' Alliance Agreement.

Second, the information has been "obtained from a **person**" within the meaning of Exemption (4).

Third, the information is "**confidential**." This confidential information is not generally available to the public, and its public disclosure is not required to further the public interest or to promote competition. In National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), the court held that information is "**confidential**" for purposes of Exemption (4) if it would not customarily be released to the public by the person from whom it was obtained, and if disclosure is likely to have either of the following results: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."

The Joint Applicants submit that public disclosure of the type of confidential information at issue here would cause substantial harm to the competitive position of the Joint Applicants, and could impair the Government's ability to obtain

similar information on a voluntary basis from individuals in the future.

In addition, the withholding from public disclosure of the information is also provided for under Exemption (3), Exemption (3) pertains to information specifically exempted from disclosure by some other statute, such as 49 USC 40115. The release of the information which is the subject of this motion may "prejudice the formulation and presentation of positions of the United States and international negotiations" with foreign governments, and disclosure would therefore be inconsistent with 49 USC 40115. The Department has ruled that U.S. carrier aircraft cost data submitted under Form 41 should be withheld from public disclosure under former Section 1104 of the Act (now 49 USC 40115) because of the competitive harm that would result to the filing carriers if such data were revealed to foreign carriers not required to file the same information. See letter of November 1, 1993 from James W. Mitchell to American Airlines, Docket 48800; see also Order 93-12-32, p. 4 (United/Lufthansa). The release of the sensitive commercial information subject to this motion would have similar adverse impacts on the Joint Applicants if it is obtained by their competitors, who are not required to submit similar information.

11. ACCESS TO THESE HIGHLY SENSITIVE DOCUMENTS SHOULD BE LIMITED TO COUNSEL AND OUTSIDE EXPERTS.

The Joint Applicants are submitting highly sensitive internal corporate documents, studies, surveys, analyses, and reports which should be accorded limited access only to counsel and outside experts who file Rule 39 affidavits stating that the affiant will (a) use the information only for the purpose of participating in this proceeding, and (b) not disclose such information to anyone other than counsel or outside experts who have filed a valid affidavit.

These documents contain highly sensitive commercial information, and include corporate documents, studies, surveys, analyses and reports prepared by each of the Joint Applicants for international planning and strategic decision-making. The information contained in these documents has not been publicly released; some of the documents have not even been shared among the Joint Applicants. If released, competitors of the Joint Applicants would gain valuable insights into the internal strategies and objectives with respect to the most competitively sensitive matters relating to the Joint Applicants.

In order to minimize the risk of harmful disclosure of this competitively sensitive information, access should be limited as requested. The Joint Applicants are filing concurrently with this motion five copies of this information, in sealed envelopes labeled "Confidential Treatment Requested

Under 14 CFR 302.39; Access Is Limited To Counsel Or Outside Experts."

The request to limit disclosure only to counsel and outside experts is consistent with Department precedent and policy. Thus, in Order 93-12-32 (United/Lufthansa), the Department granted the applicants' request to **limit access to** certain confidential information only to counsel for interested parties and outside experts who filed Rule 39 affidavits. In limiting such access, the Department balanced the disclosure of the confidential information against the competitive harm to the applicants that would result if access were expanded, and concluded that **"the** undue competitive harm to the applicants outweighs the **commenters'** need for expanded access to the highly sensitive material in this **case"** (p. 5). The Department also noted that "interested parties to this proceeding can obtain adequate advice on the merits of the application through outside experts and persons authorized to review the materials" (id.). Access to the Joint Applicants' internal reports and analyzes should be limited in a comparable manner, in light of the undue competitive harm to the Joint Applicants that would result from a broader disclosure of such highly sensitive information.

111. REQUEST FOR IN CAMERA REVIEW OF CERTAIN EXTRA-ORDINARILY SENSITIVE INFORMATION

The Joint Applicants have withheld certain extraordinarily sensitive commercial information which they will make available to DOT staff for review, on an in camera basis, in order for the Department to determine the relevance of these documents to the proceeding. Any disclosure of this information to competitors -- even on a confidential basis under Rule 39 -- would reveal key information concerning the financial and operating performance of the Joint Applicants' existing and prospective code-share services on a route-specific basis, and thereby cause irreparable competitive and commercial harm.

In light of the serious competitive damage that public disclosure of this information would impose, competitors seeking access to this kind of confidential information carry a significant burden that the information is relevant and essential for them to participate adequately in the proceeding, and also that their need outweighs the enormous harm that would result from such disclosure. See Order 94-5-43 (Delta/Virgin Atlantic). Significantly, in that order the Department determined that route-specific information concerning code-share seats and prices **"is** indeed both irrelevant to our review and highly commercially sensitive," and that **"the** information will not assist parties in addressing the issues raised by the application" (p. 4). See also Order 93-12-31 (United/

Lufthansa); Order 87-2-33 (American/Air Cal); Order 87-4-39 (USAir/Piedmont).


In Order 93-12-31, the Department permitted the applicants to withhold such extraordinarily sensitive information, finding that:


"[T]he information is not relevant to our public interest assessment of the merits of this application. The documents contain sensitive competitive information that does not need to be examined to assess the public interest issues in this case. Similarly, other interested parties in this proceeding will not be affected adversely by not having this information. In contrast, the great commercial sensitivity of the material creates the potential for significant harm to the applicants if the material were released and available to their direct competitors in the market. All relevant portions of the Alliance Agreement are already either public or available to persons filing proper affidavits. Therefore, we will not require the applicants to file this information in this proceeding" (p. 5 n. 5).


The Joint Applicants request similar treatment here, and a ruling that the withheld information is not necessary to the Department's public interest assessment.


WHEREFORE, the Joint Applicants hereby move that the Department withhold the confidential information filed concurrently herewith under seal from public disclosure as requested above, pursuant to 14 CFR 302.39 and 49 USC 40115.

Respectfully • bmitted,


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Associate General Counsel
American Airlines, Inc.

November 3, 1995

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing joint motion by first-class mail on all persons named on the service list attached to the joint application.


CARL B. NELSON, JR.

November 3, 1995